Euro Chauffeur (M) Sdn Bhd v Mohamed Yusoff bin Yahakub

HIGH COURT (IPOH) — CIVIL APPEAL NO AA-12B-36–08 OF 2017
ANSELM CHARLES FERNANDIS JC
21 DECEMBER 2018
[2018] MLJU 1928

Tort — Road accident — Loss of use — Whether appellant mitigated its losses — Whether appellant was only entitled to be compensated according to Bank Negara Guidelines — Whether there collusion between appellant and Ipoh Motors regarding period of repair — Whether there was collusion between appellant and Asia Leisure with regards to amount paid for hiring of the replacement vehicle — Whether agreement between Asia Leisure and appellant void

This was an appeal by the appellant regarding its claim for the loss of use of their Mercedes Benz S300L registration No AHJ 9886 ('the Mercedes'). The loss of use arose when the vehicle No WTS1646 driven by the respondent collided into the rear of the appellant's Mercedes. In this regard, the Mercedes had to be repaired at Ipoh Motors Sdn Bhd ('Ipoh Motors'). The appellant then entered into car rental agreement ('P11') with Asia Leisure Sdn Bhd ('Asia Leisure') for the hire of a replacement car. The appellant incurred expenses for the hire of the replacement car for the 172 days the Mercedes was at Ipoh Motors. The total amount claimed for the loss of use of the Mercedes was RM430,000 (172 days x RM2,500 per day). The respondent opposed the appellant's claim on the basis that there was collusion between the appellant, Asia Leisure and Ipoh Motors in which the hire sum was inflated and the length of repair extended to more than was necessary. The respondent stated that to mitigate its losses, the appellant ought to have used their other cars in their possession while the Mercedes was being repaired. It was also contended that the hire of the car at RM2,500 per day was exorbitant. The respondent asserted that the only damages for the loss of use in which the appellant was entitled to be compensated was in accordance with the Bank Negara Guidelines ('the guidelines'). The respondent went on to show that Asia Leisure did not have a license to hire out cars under Land Public Transport Act 2010 and Tourism Licensing Act 1999 and that the agreement between the appellant and Asia Leisure was therefore void under s 24 of the Contract Act 1950. The learned sessions court judge ('SCJ') concluded that the hire agreement ('P11') was a sham agreement and that the agreement between the appellant and Ipoh Motors was void under s 24 of the Contracts Act 1950. The appellant being dissatisfied with the decision of the SCJ appealed to the High Court. The issues arose were: (a) the allegation that there was collusion between the plaintiff and Ipoh Motors with regards to the period of repair and Asia Leisure with regards to the amount paid for the hiring of the replacement vehicle; (b) the guidelines

A and its applicability to the present case; and (c) whether the agreement between the plaintiff and Asia Leisure was void and if so, the consequences thereof.

Held, allowing the appeal with costs of RM2,000:

B (1) SCJ decided that two months was the period in which the Mercedes ought to have been repaired and delivered to the appellant was based on the respondent's adjustor's report. This court was of the view that the relevant period to be considered was not how long the repairs should or ought to have taken, but rather the duration the appellant had been deprived of having the Mercedes because of the negligent act of the C respondent. It was also of no consequences that the appellant had other luxury cars at its disposal at the material time (see para 17).

(2) The plaintiff through SP2 and SP4 had adequately explained why the repairs took 172 days to complete. It was obvious that the process of D repair was in the hands of Ipoh Motors and the plaintiff had no say in the progress of the repair work. On analysing the facts, the court could not find any evidence that SP2 and SP4 were delaying in the repair of the Mercedes on purpose or they were in collusion with the plaintiff. Further, the court found it difficult how cll 9 and 12 of P11 could be inferred to E mean that there was collusion between Asian Leisure and the plaintiff against the defendant. In addition, based on the authority of *Daily Office Cleaning Contractors v Shefford* [1977] 4 WLUK 63; [1977] RTR 361, the plaintiff did not act unreasonably in wanting a replacement car of the same class as his damaged Mercedes. The burden was on the defendant to F prove the alleged collusion to defraud him on the balance of probabilities and the defendant in the present case had failed to discharge such burden (see paras 18–19, 23 & 26–29).

(3) On the second issue on whether the guidelines were applicable, the court G noted that there was nothing pleaded with regards to the applicability of the guidelines in the assessment of the loss of use of the Mercedes. Neither was it specifically stated or explained by the learned SCJ or the respondent what these guidelines were. It was pertinent to state why these guidelines were important as they were relied upon by the SCJ in H determining the amount that can be claimed by the appellant in this case. In this respect, there was no evidence adduced to ascertain what these guidelines were and how, if at all, they applied to the present case (see para 31).

I (4) On the third issue, the court found that Asia Leisure did not have a licence under the Land Public Transport Act 2010 and the Tourism Licensing Act 1999 to operate a car rental business when they hired out the replacement car to the appellant. However, this did not affect the claim by the appellant against the respondent in tort for the loss of use of the Mercedes. In saying this the court took into consideration that there

was no evidence at all to indicate that the appellant, at the time of hiring the replacement car, knew that Asia Leisure did not have a licence to operate a car hire business. P11 by itself was not illegal. There was evidence both documentary and as well as oral evidence to show that payment was made by the appellant to Asia Leisure for the hire of the replacement car. In such circumstances and on the facts of this case, it would be unjust for the appellant to be barred from pursuing their claim against the respondent in tort (see paras 32–33).

(5) In considering the quantum the court had taken into account the fact that the appellant had not taken adequate steps to mitigate the expenses incurred for the hire of the replacement vehicle. He did not look further than Ipoh in hiring the replacement car. SD2 had, in his report marked (D37) obtained the rates from several car rental companies in the Klang Valley and SD2 stated that the car rental company 'Suria Car Rental and Tour Sdn Bhd' was putting up for hire a Mercedes Benz of similar model as the damaged Mercedes. The rental per month was RM13,500. The court was of the opinion that this would be a fair amount to be paid to the appellant for the loss of use of the Mercedes. This would work out to RM450 per day. Since it had been proven that the appellant had been deprived of his Mercedes for 172 days the total loss would be RM77,400 (see para 34).

[Bahasa Malaysia summary

Ini adalah rayuan pemohon berkaitan dengan tuntutannya untuk kerugian penggunaan Mercedes Benz S300L bernombor pendaftaran AHJ 9886 ('Mercedes'). Kerugian penggunaan berbangkit apabila kenderaan No WTS1646 yang dipandu oleh responden bertembung dengan sisi cermin Mercedes perayu. Berhubung perkara ini, Mercedes kena dibaiki di Ipoh Motors Sdn Bhd ('Ipoh Motors'). Perayu kemudiannya memasuki perjanjian penyewaan kereta ('P11') dengan Asia Leisure Sdn Bhd ('Asia Leisure') untuk penyewaan kereta gantian. Perayu menanggung perbelanjaan untuk penyewaan kereta ganti untuk 172 hari Mercedes itu di Ipoh Motors. Jumlah keseluruhan untuk kerugian penggunaan Mercedes adalah RM430,000 (172 hari x RM2,500 satu hari). Responden menentang tuntutan perayu atas dasar bahawa terdapat pakatan sulit di antara perayu, Asia Leisure dan Ipoh Motors di mana jumlah penyewaan adalah lebih dan jangka masa untuk diperbaiki lebih panjang daripada apa yang diperlukan. Responden menyatakan bahawa untuk membuat mitigasi atas kerugian-kerugian, perayu seharusnya menggunakan kereta-kereta lain yang di dalam milikannya sementara Mercedes tersebut diperbaiki. Ia juga dinyatakan bahawa penyewaan kereta pada harga RM2,500 sehari adalah melampau. Responden menyatakan bahawa kerugian penggunaan yang mana perayu layak ditebuskan hanyalah mengikut Garis Panduan Bank Negara ('garis panduan tersebut'). Responden seterusnya menunjukkan bahawa Asia Leisure tidak mempunyai lesen untuk

menyewa kereta-kereta di bawah Akta Pengangkutan Awam 2010 dan Akta Lesen Pelancongan dan bahawa perjanjian di antara perayu dan Asia Leisure adalah dengan ini terbatal di bawah s 24 Akta Kontrak 1950. Hakim mahkamah sesyen yang terpelajar ('HMS') membuat kesimpulan bahawa perjanjian penyewaan ('P11') adalah perjanjian palsu dan bahawa perjanjian di antara perayu dan Ipoh Motors adalah terbatal di bawah s 24 Akta Kontrak 1950. Perayu yang tidak berpuas hati dengan keputusan HMS merayu ke Mahkamah Tinggi. Isu-isu yang dibangkitkan: (a) dakwaan bahawa terdapat pakatan sulit antara plaintif dan Ipoh Motors berkenaan dengan tempoh pembaikan dan Asia Leisure berkenaan kepada jumlah yang dibayar untuk penyewaan kenderaan gantian; (b) garis panduan dan pemakaiannya kepada kes ini; dan (c) sama ada perjanjian di antara whether plaintiff dan Asia Leisure adalah terbatal dan oleh itu, akibatnya.

Diputuskan, membenarkan rayuan dengan kos-kos sebanyak RM2,000:

(1) HMS membuat keputusan bahawa tempoh dua bulan di mana Mercedes diperbaiki dan dihantar kepada perayu adalah berdasarkan repot penilai milik responden. Mahkamah walau bagaimanapun, berpandangan bahawa tempoh masa relevan yang patut dipertimbangkan bukanlah berapa lama pembaikian atau patut diambil, tetapi lebih kepada tempoh perayu telah dinafikan menggunakan Mercedes sebab tindakan cuai responden. Ia juga tidak mempunyai apa-apa akibat bahawa perayu mempunyai kereta-kereta mewah yang lain dan boleh digunakan beliau pada masa yang material (lihat perenggan 17).

(2) Plaintif melalui SP2 dan SP4 telah secara cukupnya menerangkan mengapa pembaikan mengambil masa 172 hari untuk disempurnakan. Ia adalah jelas bahawa proses pembaikan adalah di tangan Ipoh Motors dan plaintiff tidak berhak ke atas perkembangan kerja pembaikan. Dalam menganalisa fakta-fakta, mahkamah tidak boleh menjumpai apa-apa keterangan bahawa SP2 dan SP4 melambatkan pembaikan Mercedes dengan sengaja atau terdapatnya pakatan sulit dengan plaintif. Selanjutnya, mahkamah menjumpai ia susah bagaimana klausa 9 dan 12 oleh P11 boleh dirujuk untuk bermaksud pakatan sulit di antara Asian Leisure dan plaintif terhadap defendan. Tambahan pula, berdasarkan autoriti *Daily Office Cleaning Contractors v Shefford* [1977] 4 WLUK 63; [1977] RTR 361, plaintif tidak bertindak dengan tidak wajar dalam berkehendak untuk kereta gantian dengan kelas yang sama seperti Mercedesnya yang telah rosak. Bebannya adalah kepada defendan untuk membuktikan dakwaan pakatan sulit untuk menipunya atas keseimbangan probability dan defendan di dalam kes ini telah gagal untuk melepaskan bebanan tersebut (lihat perenggan 18–19, 23 & 26–29).

(3) Atas isu kedua, sama ada garis panduan adalah terpakai, mahkamah sedar

bahawa tiada apa-apa yang diplidkan berkenaan dengan pemakaian garis panduan dalam penilaian kerugian pemakaian Mercedes. Juga ia tidak dinyatakan secara spesifik atau diterangkan oleh HMS yang terpelajar atau responden tentang panduan ini. Ia adalah penting untuk dinyatakan bahawa mengapa garis panduan ini penting kerana ia disandarkan oleh HMS dalam memutuskan jumlah yang akan dituntut oleh perayu dalam kes ini. Sedemikian dengan itu, tiada keterangan yang dikemukakan untuk memastikan apa garis panduan ini dan bagaiman, jikalau ia terpakai dalam kes ini (lihat perenggan 31).

(4) Atas isu ketiga, mahkamah memutuskan bahawa Asia Leisure tidak mempunyai lesen dibawah Akta Pengangkutan Awam 2010 dan Akta Lesen Pelancongan untuk menjalankan perniagaan sewa kereta apadabila ia menyewa kereta gantian kepada perayu. Walau bagaimanapun, ini tidak memberi kesan kepada tuntutan perayu terhadap responden di dalam tort untuk kerugian penggunaan Mercedes tersebut. Dalam menyatakan mahkamah ini mempertimbangkan bahawa tiada keterangan langsung untuk menunjukkan bahawa perayu, pada masa penyewaan kereta gantian, tahu bahawa Asia Leisure tidak mempunyai lesen untuk menjalankan perniagaan kereta sewaan. P11 sendiri adalah haram. Tiada keterangan sama ada dokumen dan juga keterangan lisan untuk menunjukkan bahawa bayaran dibuat oleh perayu kepada Asia Leisure untuk menyewa kereta gantian. Di dalam keadaan dan atas fakta-fakta kes, ia adalah tidak adil untuk perayu dihalang untuk menyambung tuntutannya terhadap responden dalam tort (lihat perenggan 32–33).

(5) Dalam memutuskan jumlah mahkamah telah mengambil kira fakta bahawa perayu tidak mengambil langkah-langkah yang cukup untuk mitigasi perbelanjaan-perbelanjaan yang ditanggung untuk penyewaan kenderaan gantian. SD2 telah, di dalam laporan bertanda (D37) mendapat kadar-kadar daripada beberapa syarikat penyewaan kereta di Klang Valley dan SD2 menyatakan bahawa syarikat penyewaan kereta 'Suria Car Rental and Tour Sdn Bhd' menyewa Mercedes Benz yang sama model dengan Mercedes yang rosak. Sewa sebulan adalah RM13,500. Mahkamah berpendapat bahawa ia adalah jumlah yang adil untuk dibayar kepada perayu atas kerugian penggunaan Mercedes. Ini akan menjadi RM450 sehari. Memandangkan ia telah dibuktikan bahawa perayu telah dinafikan Mercedesnya untuk 172 hari kerugian total adalah RM77,400 (lihat perenggan 34).]

Notes

For cases on road accident, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2387–2394.

Cases referred to

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255; [2018] 1 LNS 474, CA (refd)
Brain v Yorkshire Rider Ltd [2007] 3 WLUK 668; [2007] Lloyd's Rep IR 564 (folld)
Daily Office Cleaning Contractors v Shefford [1977] 4 WLUK 63; [1977] RTR 361, QBD (folld)
Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35; [1987] CLJ Rep 579; [1987] 2 CLJ 145, SC (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)
Lee Heng Yak & Anor v Li Chee Loong & Anor [2018] MLJU 1346; [2018] 1 LNS 1462, CA (refd)
Mediana (Owners) v Comet (Owners, Master and Crew of the Lightship), The Mediana [1900] AC 113; [1900–3] All ER Rep 126, HL (folld)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal [2014] 1 MLJ 492; [2015] 7 CLJ 584, CA (refd)
Tay Lye Seng & Anor v Nazori bin Teh & Anor [1998] 3 MLJ 873, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)

Legislation referred to

Contracts Act 1950 s 24
Evidence Act 1950 ss 102, 103
Land Public Transport Act 2010 ss 16(1), (5)
Tourism Vehicles Licensing Act 1999

Cheong Yau Kheong (BH Koh, Soong, Zarin & Partners) for the appellant.
Selvarajah a/l Nadarajah (Raj Selva & Co) for the respondent.

Anselm Charles Fernandis JC:

INTRODUCTION

[1] The plaintiff's claim against the defendant is for the loss of use of their Mercedes Benz S300L registration No AHJ 9886 ('the Mercedes'). The parties will be known as they were in the court below. The appellant is the plaintiff and the respondent the defendant herein.

[2] The loss of use arose vehicle No WTS1646 driven by the defendant collided into the rear of the plaintiff's Mercedes. As a consequence the Mercedes had to be repaired at Ipoh Motors Sdn Bhd ('Ipoh Motors'). The plaintiff then entered into car rental agreement ('P11') with Asia Leisure Sdn Bhd ('Asia Leisure') for the hire of a replacement car. The plaintiff incurred expenses for the hire of the replacement car for the 172 days the Mercedes was

pinpointlabel="act"pinpointlabel="act" at Ipoh Motors. The total amount claimed for the loss of use of the Mercedes was RM430,000 (172 days x RM2,500 per day).

[3] To prove their case the plaintiff called, John Singh ('SP1') who was driving the car at the time of the accident and who is the father SP5, the director of the plaintiff company, Ahmad Rosidi, the second witness the investigating officer, R Sarveswaran ('SP3'), Dealer Principle for Cycle and Carriage, Khong Mun Loong ('SP4'), Service Manager at Cycle and Carriage, Lawrence John Singh ('SP5'), the director of the plaintiff company and son to SP1, and Chang Wai Kee ('SP6'), a shareholder of Asia Leisure and also the person who signed the P11 with the plaintiff.

[4] There is no issue as to liability as the defendant had elected not to call evidence to refute the plaintiff's claim in respect of liability. The defendant was therefore found to be 100% liable for the accident.

[5] The defendant however opposes the plaintiffs claim on the basis that there was collusion between the plaintiff, Asia Leisure and Ipoh Motors in which the hire sum was inflated and the length of repair extended to more than was necessary. They state that to mitigate its losses the plaintiff ought to have used their other cars in their possession while the Mercedes was being repaired.

[6] It was also contended that the hire of the car at RM2,500 per day was exorbitant. The defendant asserts that the only damages for the loss of use in which the plaintiff was entitled to be compensated was in accordance with the Bank Negara Guidelines ('the guidelines').

[7] They went on to show that Asia Leisure did not have a licence to hire out cars under Land Public Transport Act 2010 and Tourism Vehicles Licensing Act 1999. The defendant's contention was that the agreement between the plaintiff and Asia Leisure was therefore void under s 24 of the Contracts Act 1950.

[8] Two witnesses were called by the defendant. Their first witness was Kamaruddin Khri, an officer from SPAD. He was called to show that Asia Leisure did not have a licence to hire out vehicles. The other witness was Goh Soon Cheng, a private investigator who tendered the adjustor's report D37.

[9] The learned sessions court judge ('SCJ') concluded that the hire agreement D11 was a sham agreement. She however awarded the sum of RM1,800 to the plaintiff for the hiring of the replacement car. She based this figure on the guidelines in awarding RM30 a day and the fact that according to the adjusters appointed by the defendants it would take approximately two

A months to complete the repairs (RM30 as loss of use on a daily basis for 60 days).

[10] In her judgement the learned SCJ had found that there was collusion between the plaintiff and Asia Leisure to defraud the defendant. The SCJ went on to say that cll 9 and 12 of the agreement were unduly onerous on the plaintiff and found that those clauses would not be agreed on in the ordinary course of business. Whilst commenting on the agreement the learned SCJ stated:

> This court finds that cl 9 appears to put the burden on the hirer to pay for cost of repairs and maintenance, while cl 12 puts an additional burden on the hirer to indemnify Asia Car Rental. Reference to the first schedule to P11 also did not specify the registered number of the vehichle to be rented to the plaintiff. This agreement was unlike any other agreement as it did not state the type of car nor the registration number of the car which the plaintiff was going to receive. This did not make sense at all, if a person agreed to pay RM2,500 as rental for a car per day, surely the agreement must specify the type of car which the hirer would receive. It is unreasonable for the plaintiff to pay a high amount as rental per day for a vehicle which is not specified in the agreement. What is even more bizarre is that the plaintiff proposed the amount of RM2,500 as rental but receive a second-hand Toyota. Definitely the loss of use of his Mercedes Benz being a luxury car cannot be equated to a Toyota. The terms of the agreement in P11 had set out an unusual arrangement between them.

[11] The learned SCJ found it strange that that SP5 could not remember the registration number of the replacement car. She went on to question why the RM30,000 had been paid by cash and that there was no evidence from where this money came from. The learned SCJ found it illogical that the SP5 would spend RM430,000 in hiring a car when the cost of a Mercedes Benz S300L was RM330,000 at that time. These factors influenced the learned SCJ in concluding that D11 was a sham agreement.

[12] Apart from all this the learned SCJ also held that the agreement between Asia Leisure and the plaintiff was void because Asia Leisure was not licensed under s 16(1) and (5) of the Land Public Transport Act 2010. That being the case the agreement between the plaintiff and Ipoh Motors was void under s 24 of the Contracts Act 1950.

[13] The plaintiff being dissatisfied with the decision of the SCJ appealed to the High Court.

[14] The issues to be considered are:

(a) the allegation that there was collusion between the plaintiff and Ipoh Motors with regards to the period of repair and Asia Leisure with regards to the amount paid for the hiring of the replacement vehicle;

(b) the guidelines and its applicability to the present case; and

(c) whether the agreement between the plaintiff and Asia Leisure was void and if so, the consequences thereof.

FINDINGS OF THE COURT

[15] On the first issue, it is not in dispute that the Mercedes was in the workshop of Ipoh Motors for more than 172 days. This is evident from the letter by SP2 dated 27 July 2015 (P5). The letter also states the reason the Mercedes was in with Ipoh Motors. It is in evidence that Ipoh Motors is the only repairer for Mercedes Benz authorised by Cycle and Carriage. The time the Mercedes was with Ipoh Motors can also be seen from the Gate Pass (P6) clearly showing that the Mercedes was in the workshop for more than 172 days. The reasons why the repairs took 172 days to complete were further explained by SP4 where he stated the following:

> PD: How many man you assigned to do the job? Workshop or mechanic?
>
> SP4: In my department, I have three mechanics. For body and built repair.
>
> PD: So, if they have started the work on the 6th of April, why didn't they finish it within two weeks?
>
> SP4: Because this car involves chassis body repair. Chassis body repair needs body alignment suits which we need to get it from our Head Quarter in Batu Caves to transfer it over and then … Because it involves chassis repair, so we have to involve all the engine parts and the gear box have to come down and put it in the chassis alignment and wheel to adjust it. It will take some time.
>
> PD: When did you place order with your KL supply department?
>
> SP4: On the 6th or April but we take three months for Germany parts to transit to Malaysia Customs.
>
> …
>
> PD: I put it to you that no spare parts were requested from Germany through the Head Office from Kuala Lumpur. I put it to you. You are not telling the truth.
>
> SP4: I don't agree because the parts come from Germany.
>
> PD: Ya lah … All Mercedes original parts comes from Germany. In this case, did you place any particular spare parts which you obtain from Germany?
>
> SP4: Yes … Yes …
>
> …
>
> Mah: 3 keping Purchase Order ditanda sebagai P-8(a–c).

PD: Mr Khong, by the 24th or March 2015, you have the necessary spare parts to start over?

SP4: Yes.

PD: What was the difficulty in completing the work? What was the problem?

SP4: Sir, because the car was not in a good shape. So, we dismantle it part by part which is one of the procedures. Secondly we have to get the loan parts. In Malaysia we only have one set for chassis aligmnet. So ... the whole Malaysia we are shiring this chassis alignment. So ... this need to be rotates among all the Mercedes Benz dealer. By the time we receive this we have to book. So ... in the meanwhile waiting for the (unclear 2.46.22) badge to arrive to our place, we have to dismantle all the gear box. Actually, nearly the whole body of the rear parts because of the major damage of the rear parts. And the seat at the rear have to be removed together in order to adjust back the alignment. Basically we have to empty back the whole car and put it on the bench and by which time we started to cut. Only with the cut and join only we can do the step. Cutting and joining. So ... this will take time.

PD: You mean to say that equipment for tesing this particular sort of vehicle is only available in one place?

SP4: Yes, only one place. We store in our HQ in Batu Caves.

[16] According to SP4 although the adjusters from the plaintiff insurance company stated in their report that the repairs would be completed in seven days, that was only an estimation and where all the parts were there. SP4 also stressed that they had other vehicles to attend too and repair at that material time. Ipoh Motors was also not obliged to inform the insurers of the repairs took longer than seven days. In any event the insurance company did not make any complaint as to the time period of the repair and had in fact settled the claim for the cost of the repairs. SP4 categorically denied that Ipoh Motors had deliberately delayed the repair of the Mercedes.

[17] It is clear from her judgement that the SCJ decided that two months was the period in which the Mercedes ought to have been repaired and delivered to the plaintiff was based on the defendant's adjustor's report. This court is however of the view that the relevant period to be considered was not how long the repairs should or ought to have taken, but rather the duration the plaintiff had been deprived of having the Mercedes because of the negligent act of the defendant. It is also of no consequence that the plaintiff had other luxury cars at its disposal at the material time. In this respect I agree with what was stated in the case of *Mediana (Owners) v Comet (Owners, Master and Crew of the Lightship), The Mediana* [1900] AC 113 at p 117; [1900–3] All ER Rep 126 at p 129, referred to by learned counsel for the plaintiff. In that case the principle was explained in the following manner:

> Now, in the particular case before us, apart from a circumstance which I will refer to immediately, *the broad proposition seems to me to be that by a wrongful act of the*

> *defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase 'the use of the vessel'.* What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. *Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?* The proposition so nakedly stated appears to me to be absurd. (Emphasis added.)

The reasoning enunciated in *The Mediana* was cited with approval in the recent Court of Appeal case of *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255; [2018] 1 LNS 474.

[18] This court is of the view that the plaintiff, through SP2 and SP4 had adequately explained why the repairs took 172 days to complete. On analysing the facts, this court cannot find any evidence that they were delaying in the repair of the Mercedes on purpose or that they were in collusion with the plaintiff.

[19] In this respect it is obvious that the process of repair was in the hands of Ipoh Motors. It must be emphasised that the plaintiff had no say in the progress of the repair work. The expectation of the plaintiff would be that at the end of the day the Mercedes would be repaired and drivable. The plaintiff cannot therefore be penalised for the fact that Ipoh Motors took 172 days to ensure the Mercedes was fully repaired and drivable.

[20] It could also be seen that the defendant had threatened to take third party proceedings against Ipoh Motors. This can be found in the letter dated 9 March 2016 from the defendant's solicitors to Ipoh Motors. However, no action by the defendant had been taken against them to this date. It is not unreasonable to construe in the circumstances that no action was taken against Asia Leisure as there was no evidence of any collusion between them and the plaintiff.

[21] On the aspect of the price of the hiring of a Mercedes S300L or equivalent to that, the reasoning given by the plaintiff as to why he needed such a car at such a price. He stated as follows:

> Didn't you think the rate of RM2,500 per day is quite exorbitant?
>
> No. I agreed to enter into the contract because: I needed another car of the same prestige urgently to replace the affected car for my work. I was informed by Ipoh Motors that the rate was in the region of RM2,500 per day. ...
>
> Secondly, I was informed by Ipoh Motors at that time that it would only take a short

A period of time to repair the affected car and therefore the cost would not be that much.

In *Brain v Yorkshire Rider Ltd* [2007] 3 WLUK 668; [2007] Lloyd's Rep IR 564 it was stated:

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> Once the starting point of need is established as it was in this case, then it would seem that ordinarily the motorist will be able to hire an equivalent car to his own. There is, in particular, no principle which requires a claimant to put up with a car that is of a different and less expensive type.

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[22] There is no dispute that the plaintiff is a director of several companies, one of which is the plaintiff company. It is also in evidence that apart from his family members he uses the Mercedes most of the time. On the date of the accident he let his father SP1 drive the car to bring his son for a haircut. He argues that as a matter of prestige and his standing in the business community he requires a Mercedes S300L or equivalent. In this respect learned counsel for the plaintiff argues that it is only right that the plaintiff be compensated for the cost of hiring a replacement car of equivalent status. In this case the replacement car was a Toyota Vellfire considered by Asia Leisure and the plaintiff to be of equal standing as the Mercedes. At the time of the hire Asia Leisure did not have a Mercedes S300l for hire. Reliance was made by the plaintiff on the case of *Daily Office Cleaning Contractors v Shefford* [1977] 4 WLUK 63; [1977] RTR 361. The abstract of the case states as follows:

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> A plaintiff who suffers damage to a prestige motor-car is entitled to hire a prestige substitute whilst repairs are taking place. P Co provided prestige motor-cars for their directors. One of them had an American Rambler Ambassador which was badly damaged sdue to the negligent driving of D. P Co took the car to their regular garage, and hired from the same garage a Jaguar XJ6 as a substitute at GBP 75 per week. The Rambler took 25 weeks to mend because the suppliers were slow to provide spare parts, and the cost of the hire claimed against D came to GBP 1,736.11.
>
> *Held,* P Co were entitled to hire a substitute of *comparable prestige* and, since they were not to blame for the delay, *they had not been unreasonable*. They were therefore entitled to the sum claimed. (*Dictum of Lord Macmillan in Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452; [1932] 4 WLUK 38 applied). (Emphasis added.)

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I Along the same lines, it was held in *Brain*:

> When assessing damages for the cost of hiring a replacement car following a road traffic accident the judge had misdirected himself and had erred in holding that a claimant had failed to mitigate his loss by hiring an equivalent car instead of a cheaper vehicle.

[23] Based therefore on the authority of *Daily Office Cleaning Contractors* and *Brain* this court is of the view that the plaintiff in this case did not act unreasonably in wanting a replacement car of the same class as his damaged Mercedes.

[24] This court further noted that in his evidence SP6 stated that the rate of RM2,500 per day for the hire of the replacement car was not exorbitant. He said other car rental companies charged RM2,800 for a mere eight hours of hire. This court would, however, have to compare his figures to what was stated by SD2, who had made comparisons with other car rental companies on this point.

[25] Still on the issue of the allege collusion between the plaintiff, Ipoh Motors and Asia Leisure, it is clear from the pleadings the defendant alleges the collusion involves the perpetration of a fraud to inflate the rental for the hire of the car. This can be seen in paras 5(v) and 7 of the 'Pernyataan Pembelaan Defendan Terpinda Kedua' filed on 2 March 2017. The relevant paragraphs read as follows:

> 5(v). Plaintif dengan bantuan Asia Leisure & Car Rental Sdn Bhd dan Ipoh Motors Sdn Bhd dengan sengaja membesar-besarkan sewaan yang dikatakan dibayar oleh Plaintif untuk membuat tuntutan ini.
>
> 7. Selanjutnya atau dalam alternative Defendan menyatakan bahawa susunan menyewa kereta antara Plaintif dan Asia Leisure & Car Rental Sdn. Bhd. seperti dinyatakan dalam Penyataan Tuntutan adalah satu susunan penipuan (sham arrangement) atas alasan berikut :
>
> (i) ...
>
> (ii) ...

[26] It is trite law that the burden or obligation of proving a fact is on the party who exerts the existence of that fact in issue and wishes the court to believe in its existence — (see ss 102 and 103 of the Evidence Act 1950). The burden therefore is on the defendant to prove the allege collusion to defraud him. The standard would be on the balance of probabilities. *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal* [2014] 1 MLJ 492; [2015] 7 CLJ 584.

[27] As stated earlier the learned SCJ had based her findings that P11 was a sham agreement on the reasons as set out at paras 10–11 above. In my view the defendant had failed to discharge the burden on them to prove that there was a collusion to defraud him. In the light of this finding it is this court's view that these factors which were depended on by the SCJ were based on conjecture and mere suspicion. In this respect there were contemporaneous documents such as P5 (letter dated 27 July 2015 from R Sarveswaran (SP3) and P6 (Gate Pass)

showing that the Mercedes was in the workshop Ipoh Motors for more than 172 days undergoing repairs, P7(a–b)(letter from Ace Jerneh Insurance Company showing that the insurance company had paid for the repairs to the Mercedes) P12 (receipt of payment of RM30,000 initial payment made by plaintiff to Asia Leisure, P13 and P14 (receipts showing that the sum of RM430,000 had been paid to Asia Leisure by the plaintiff for the hire of the replacement car) P16 and P31 (bank statements showing amount of RM400,000 from the plaintiff's account to Asia Leisure's account), can be relied upon to determine the truth or otherwise of the matters in issue herein (see *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324, *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119 and *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; [1987] CLJ Rep 579; [1987] 2 CLJ 145 and *Lee Heng Yak & Anor v Li Chee Loong & Anor* [2018] MLJU 1346; [2018] 1 LNS 1462).

[28] It must also be emphasised that the fact showing the Mercedes having to undergo repairs for the stated period of time and the hiring and payment for the hiring of the replacement car was not only based on contemporaneous documents alone but also corroborated by the oral testimony of witnesses in particular SP3, SP4, SP5 and SP6.

[29] According to the learned SCJ one of the reasons for doubting the veracity of P11 was the fact that cll 9 and 12 required the plaintiff to pay for the cost of repair and service of the replacement car as well as to indemnify Asia Leisure for any damages. It is difficult how such clauses could be inferred to mean that there was collusion between Asia Leisure and the plaintiff against the defendant. As to the absence of the registration number of the replacement car in P11, SP6 had explained that in the event of breakdowns Asia Leisure would supply a backup vehicle immediately, either a Mercedes or equivalent. That is why the word 'equivalent' was inserted. SP6 further elaborated no registration number was stated because there was a possibility of a change of vehicle.

[30] As to the RM30,000 initial payment to Asia Leisure, SP6 explained that it was not banked into the company's account because it was Chinese New Year season and his company was Chinese based giving the impression that the RM30,000 cash was spent for Chinese New Year. As to the amounts withdrawn from Asia Leisure bank account after the RM400,000 was paid to his company, he explained that the sums withdrawn were transferred to other companies in the group. He strongly denied working together with the plaintiff to defraud the defendant's insurers.

[31] On the second issue on whether the guidelines were applicable, I note that there was nothing pleaded with regard to the applicability of the guidelines

in the assessment of the loss of use of the Mercedes. Neither was it specifically stated or explained by the learned SCJ or the defendant what these guidelines were. It is pertinent to state what these guidelines are important as they were relied upon by the SCJ in determining the amount that can be claimed by the plaintiff in this case. In this respect I find there was no evidence adduced to ascertain what these guidelines were and how, if at all, they applied to the present case.

[32] On the third issue, I find that Asia Leisure did not have a licence under the Land Public Transport Act 2010 and the Tourism Vehicles Licensing Act 1999 to operate a car rental business when they hired out the replacement car to the plaintiff. It is my view however that this does not affect the claim by the plaintiff against the defendant in tort for the loss of use of the Mercedes. In saying this I took into consideration that there was no evidence at all to indicate that the plaintiff, at the time of hiring the replacement car, knew that Asia Leisure did not have a licence to operate a car hire business. The agreement (P11) by itself was not illegal. There was evidence both documentary and as well as oral evidence to show that payment was made by the plaintiff to Asia Leisure for the hire of the replacement car.

[33] In such circumstances and on the facts of this case it would be unjust for the plaintiff to be barred from pursuing their claim against the defendant in tort. After all it is undisputed that the defendant was wholly liable for the damage to the Mercedes. It is also an undeniable fact that the Mercedes was in the workshop of Ipoh Motors for more than 172 days. The illegal act of Asia Leisure cannot be used as a defence by the defendant. On this point I can do no better than to cite the case of *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873 where the Court of Appeal observed:

> As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence: *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 (folld); *National Coal Board v England* [1954] AC 403;; [1954] 1 All ER 546 (folld); *Progress and Properties Ltd v Craft* (1976) 12 ALR 59 (folld); *Jackson v Harrison* (1978) 19 ALR 129 (folld). The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt v Fittock* (1963) 63 SR (NSW) 617; [1964] NSWR 22 (refd) *Smith v Jenkins* [1970] 44 ALJR 78 (refd); *Ashton v Turner* [1981] QB 137; [1980] 3 All ER 870 (folld) *Pitts v Hunt & Anor* [1990] 3 All ER 344 (folld).
>
> The Supreme Court's decision in *Chua*'s case, and its approval of the decisions reached by the other common law jurisdictions in *Ooi Han Sun*, *Burns*, *LeBagge* and *Dhlamini* left us with the conclusion that whilst public policy would defeat any

claim based on illegality, balance has to be drawn based on the peculiar facts and circumstances of each case. In all the cases cited above, there is the element of culpability on the part of the plaintiff who claims for loss of earnings or support for the wrongdoing complained of or that the claim flowed directly from the wrongdoing. *Where he is without fault, he may — it seems — recover according to the usual principles of measure of damages*. (Emphasis added.)

MITIGATING THE LOSS

[34] In considering the quantum this court had taken into account the fact the plaintiff had not taken adequate steps to mitigate the expenses incurred for the hire of the replacement vehicle. He did not look further than Ipoh in hiring the replacement car. It was in evidence that he only concentrated in the 'local vicinity'. SD2 had, in his report marked (D37) obtained the rates from several car rental companies in the Klang Valley as comparison to that of Asia Leisure. At p 5 of his report he states that the car rental company 'Suria Car Rental and Tour Sdn Bhd' was putting up for hire a Mercedes Benz of similar model as the damaged Mercedes. The rental per month was RM13,500 per month. I am of the opinion that this would be a fair amount to be paid to the plaintiff for the loss of use of the Mercedes. This would work out to RM450 per day. Since it had been proven that the plaintiff had been deprived of his Mercedes for 172 days the total loss would be RM77,400.

CONCLUSION

[35] I therefore allow this appeal and award cost of RM2,000 to the plaintiff.

Appeal allowed with costs of RM2,000.

Reported by Addibah Adnan